EMPLOYMENT TRIBUNALS

Claimant		**Respondent:**
Mrs M Pridsam	**v**	The Club Company (Group) Limited

Heard at: Reading by CVP **On**: 12 to 19 April 2021

Before: Employment Judge Hawksworth
Mr J Appleton
Mrs C Baggs

Appearances
For the Claimant: In person
For the Respondent: Ms S Murphy (solicitor) (12 April 2021)
Mr J Gilbert (lead litigation consultant) (13 April 2021)
Mr B Henry (counsel) (14 April 2021 onwards)

JUDGMENT having been sent to the parties on 11 May 2021 and reasons having been requested by the respondent on 12 May 2021 in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and responses

1. The claimant has been employed at Witney Lakes Resort as an instructor since 5 September 2009. She is still employed there. The respondent has owned and run the resort since it purchased the business on 15 May 2017.

2. In a claim form presented on 23 September 2018 after a period of Acas early conciliation from 27 June 2018 to 10 July 2018, the claimant brought a complaint of equal pay in relation to her hourly rate of pay. The respondent defended the claim.

3. On 18 December 2019 after Acas early conciliation from 13 to 18 December 2019, the claimant presented a second, related, claim. The second claim was joined with the first claim and both have been determined by us. The second claim included complaints of sex discrimination and victimisation. The respondent presented a response and defended the claim.

Hearing and evidence

4. The hearing took place by video (CVP). It was given a time allocation of 6 days.

5. The respondent produced a bundle of 295 pages. Page numbers in these reasons are references to that bundle. On the first morning of the hearing the claimant produced a supplemental bundle of 24 pages which included documents which had been omitted from the respondent's bundle. Other than a chronology which had not been agreed, the respondent did not object to the claimant's bundle and it was added as pages 296 to 319. The parties discussed the chronology during the tribunal's reading time and produced an agreed version. The respondent's most recent gender pay report was also added to the bundle during the course of the hearing.

6. Also on the first day of the hearing, the claimant made an application that the respondent should not be permitted to rely on its witness statements, because it had not complied with the tribunal's order for exchange of witness statements. The tribunal had ordered that exchange of witness statements should take place on 8 January 2021 but the respondent was not ready to exchange until 26 March 2021, because of the ill health of its representative Ms Murphy. Exchange took place on 1 April 2021, 11 days before the hearing. By this date, the claimant had served statements for two of her witnesses. The respondent had agreed not to consider these before exchange, but clearly did not comply with this as one of the respondent's witnesses referred to one of the claimant's witness statements in her witness statement. Further, the claimant had understood that witness statements should submitted as if exchange was taking place on 8 January 2021. If she had had more time, she would have prepared a more in-depth statement and gathered more evidence. In response to a question from the employment judge, the claimant said she would not want a postponement of the hearing, and she was happy with her evidence.

7. For reasons given at the hearing, we refused the claimant's application. We took into account that, although there had been a considerable delay by the respondent, the claimant received the respondent's statements 11 days before the start of the hearing. We concluded that any prejudice to the claimant from the delay with exchange of statements could be addressed by the following steps which were taken during the hearing:

    7.1 allowing the claimant the opportunity to give supplemental evidence and ask supplemental questions of her witnesses on any issues arising from the respondent's witness statements;
    7.2 the claimant asking questions if she wished during her cross examination of the respondent's witnesses about the extent to which they had considered the statements of her witnesses before finalising theirs.

8. The claimant also objected to the late inclusion in the bundle of a document which was a note of a grievance meeting held on 29 October 2019 (pages 266a to 266c of the bundle). We allowed the document to be included,

noting that the claimant would be able to question the respondent's witnesses about the document and her suggestion (based in part on the lateness of the disclosure) that it had been fabricated.

9. We took the time remaining at the end of the first day for reading.

10. On the second day of the hearing the tribunal received an email from Ms Murphy, who had represented the respondent the previous day, making an application to postpone because of her ill health. Her colleague Mr Gilbert attended the hearing and made the same application. We were not provided with any medical evidence. For reasons given at the hearing, we agreed to postpone the hearing until the following day to allow the respondent to find an alternative representative, but we did not agree to postpone the whole hearing. In summary, we did not consider it to be in line with the overriding objective of avoiding delay to postpone the whole hearing, particularly given the age of the claim. We also agreed with the claimant that, given the previous ill health of its representative, the respondent ought to have had plans in place to avoid the need for a postponement for reasons of ill health.

11. We used the remainder of the time on the second day for further reading.

12. The respondent was able to instruct Mr Henry of counsel and he was present from 10.00am on 14 April 2021 (the third day of the hearing). We are very grateful to Mr Gilbert and Mr Henry for their assistance at short notice.

13. We began hearing witness evidence on day three. We heard first from the claimant's witnesses Ms Hyatt and Mrs Jeffrey, then from the claimant and then her witness Ms Barton. The statement of the claimant's witness Ms Saunders was accepted and she did not attend. The claimant had also served statements for Mr Valentine, Mr Ashley, Mr Trefzer and Ms Vierk but they were unable to attend the hearing. The claimant did not make any application to postpone to allow them to attend. We told the claimant that we would read their statements and invite the respondent to outline the questions they would have asked these witnesses, and we would consider the evidence, attaching such weight as we thought appropriate bearing in mind that these witnesses had not been at the hearing for their evidence to be tested.

14. On the afternoon of 14 April 2021 we heard from the respondent's witnesses Mrs Dunn and Mrs Hill, and on 15 April 2021 from Mr Stockford, Mr Silva and Mrs Ferma.

15. Mr Henry and the claimant made closing submissions on 16 April 2021. Mr Henry provided written submissions.

16. We deliberated on 16 April 2021 and gave our judgment and reasons on 19 April 2021, explaining our findings of facts and the conclusions we had reached. The respondent has requested written reasons.

Issues

17. The issues for determination by us were discussed and agreed at preliminary hearings on 1 August 2019 and 15 July 2020.

18. The claimant provided further particulars of the allegations of direct sex discrimination and victimisation after the second preliminary hearing. They were included in the bundle at pages 63a to 63f and the respondent's response was at page 63g to 63m. The claimant provided further clarification of the allegations of victimisation at the start of the hearing.

19. The issues for us to decide were therefore as follows:

    Equal Pay

20. The claimant is an employee of the respondent: her employment is continuing. The claimant is currently unfit to work and has not worked since October 2018.

21. The respondent accepts that the claimant's complaint has been presented within the qualifying period for the purposes of section 129 Equality Act 2010.

22. The claimant, a woman, seeks to make a comparison between the pay that she received and the pay that was given to her comparators Lee Valentine and Adam Price who are both men. The claimant will say that she was employed on like work to the comparators.

23. The respondent does not take issue with the comparator Mr Valentine. The respondent agrees that the claimant and Mr Valentine were employed by the respondent to do like work.

24. The respondent does not admit or deny that the claimant and Mr Price were employed to carry out like work.

25. The respondent will say that the sex equality clause has no effect in relation to a difference between the pay of the terms on which the claimant was employed and the terms on which the comparators were employed.

26. In the case of the comparison between Mr Valentine and the claimant the respondent will say that Mr Valentine was appointed to work at weekends and at the time of his appointment there was a shortage of fitness instructors to work at weekends and therefore the respondent will say that market forces dictated his hourly rate of pay.

27. In the case of the comparison between Mr Price and the claimant the respondent will provide further information, if appropriate.

    Sex discrimination/victimisation time limits / limitation issues

28. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010? Dealing with this issue

may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis.

29. Given the date the claim form was presented and the dates of early conciliation, any complaint made in claim 3327697/2019 about something that happened before 14 September 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Equality Act section 13: direct discrimination because of sex

30. Has the respondent subjected the claimant to the following treatment:

    a. failed to properly and fairly consider the claimant's grievance about the difference in the pay that she received and that which her male colleagues received; and
    b. by conducting a sham grievance into the claimant's grievance about equal pay.

31. Was that treatment "less favourable treatment". i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators: Mr L Valentine, Mr A Price and/or hypothetical comparators.

32. If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

Equality Act section 27: victimisation

33. Did the claimant do a protected act? The claimant relies on a grievance about equal pay. The respondent accepts that the claimant's grievance of 27 March 2018 was a protected act for the purposes of section 27 of the Equality Act.

34. Did the respondent subject the claimant to any detriments as follows:

    a. The claimant was ignored by staff and management:

        i) From 27 March 2018 to 9 October 2018 reception staff ignored the claimant;
        ii) From 27 March 2018 to 9 October 2018 Mr Silva tried to avoid the claimant, would talk to someone else and look busy doing something else;
        iii) The respondent sent email messages to other instructors and not to the claimant;
        iv) The claimant's email enquiries about why she did not receive the email messages were ignored;

v) At the beginning of July 2020 instructors received telephone calls with details of classes and covid-19 measures, but the claimant was not contacted;
vi) The claimant's email enquiries about why she did not receive this contact were ignored;

b. spreading rumours about the claimant – fictional problems between the staff and members:

i) On 21 January 2020 the respondent sent fictitious minutes of a meeting on 5 February 2019;
ii) Members told each other that the claimant had a serious terminal illness and marital problems, two members asked the claimant about her health and problems in her marriage;

c. threatening the claimant with disciplinary action and dismissal:

i) From 27 March 2018 to 1 August 2019 the claimant was told not to speak to anyone past or present about their work and was threatened with disciplinary action if she did, for example on 15 June 2018 (page 132) and 13 July 2018 (page 128);

d. pressurising the claimant with deadlines:

i) in emails of 9 and 10 December 2019 from Ms Ferma.

35. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done or might do a protected act?

Findings of Facts

36. The claimant began her employment as an instructor at Witney Lakes Resort on 5 September 2009. Her contract of employment was signed and dated on this date and she was paid £20 per class. Each class lasted an hour, so the class rate was also the hourly rate of pay. Mrs Hill was the Operations Director at the time. Mrs Hill thought that the claimant had started on a self-employed basis before becoming employed, but accepted during her evidence that this was incorrect, and the claimant had been an employee since joining.

37. The claimant's comparator, Mr Valentine, was already employed at Witney Lakes Resort when the claimant's employment started. He had started on 1 October 2006.

38. At the time Mr Valentine's employment started, Mrs Jeffrey was the co-manager of the gym. She had responsibility for the aerobics timetable as well as the general running of the gym. Mr Valentine was employed to cover classes on some Saturday mornings. The background to his being taken on at the club was that the club needed cover for some Saturday morning circuit classes. The female instructor for the class did not want to take the

class every Saturday because she came from quite a distance. She wanted someone to take over one class every four weeks and recommended Mr Valentine to Mrs Jeffrey. Mrs Jeffrey's evidence was that she felt that Witney Lakes would benefit from a male instructor as the club lacked a male instructor. She thought Mr Valentine was perfect.

39. Mr Valentine discussed his rate with Mrs Jeffrey and wanted £25 per class because he was travelling from Abingdon. Mrs Jeffrey thought it was reasonable that he got the rate he was asking for. She discussed Mr Valentine's class rate with Mrs Hill and they agreed to £25. After about four weeks covering the Saturday morning class, Mr Valentine was offered other classes, including permanent classes on Saturday mornings and Wednesday mornings.

40. We find that the pay arrangements once Mr Valentine became permanent, were made with Mrs Hill rather than Mrs Jeffrey. Mrs Hill said, and we accept, that unless you were involved in them, the club's pay rates may appear rather ad-hoc. Mr Valentine was paid £25 per class for all of his classes from the time he joined. Mrs Hill thought that Mr Valentine had started on £20 per class and this had increased to £25 when other clubs offered a higher rate, but this was inconsistent with the other evidence. We find, and the respondent accepted, that Mr Valentine was paid £25 for all of his classes, from the start of his employment.

41. Mr Valentine and the claimant often covered each other's classes. When Mr Valentine covered the claimant's classes, he was paid £25 and when the claimant covered Mr Valentine's classes, she was paid £20. Those rates applied whatever day of the week the class was held on. The respondent said in its particulars that weekend roles were advertised, and the claimant could have applied for them, but we find that this was not correct. There was no evidence of weekend roles being advertised.

42. On 15 May 2017, the business was sold, and the Club Company took over management of Witney Lakes Resort.

43. In December 2017, the claimant found out through a casual conversation with Mr Valentine that he was being paid £25 per class, £5 more than her. She raised an informal grievance with her manager, Mr Silva. He had only joined a few weeks earlier on 15 November 2017. He was unable to resolve the grievance informally and the claimant presented a formal grievance on 27 March 2018. Her grievance letter said that she believed that the difference in pay between herself and her comparator amounted to pay discrimination and she would like to ask for her legal entitlement to equal pay for equal work.

44. Mr Silva wrote to the claimant on 23 April 2018 to acknowledge receipt of her grievance. He recorded that the complaint was about pay for cover classes. The claimant corrected this in an e-mail of 25 April 2018 to say that her concerns were in relation to all classes and the difference in pay between her and her comparator.

45. The claimant said that after she presented her grievance, reception staff ignored her and Mr Silva's attitude towards her changed. She said he tried to avoid her when he saw her or to look busy doing something else, or talked to someone else. Mr Silva's evidence was that neither his attitude or the attitude of any of the staff had changed. He said that he had always been the same to the claimant and pointed out that he and the claimant had met at the time of her informal grievance. He said that because he had only joined the organisation shortly before her informal grievance, he and the claimant had not had any relationship prior to her raising her grievance.

46. We saw no evidence that the reception staff were aware of the claimant's grievance and there is insufficient evidence for us to make a finding that there was a change in attitude by them following the claimant's grievance. We find, based on the evidence we heard and the chronology, that Mr Silva's attitude did not change.

47. The respondent made changes to its pay structure from 1 May 2018, prompted by the claimant's grievance. It said it did so to make the pay structure one that was 'more fair and transparent'. It introduced a weekday rate of £20 per class and a weekend rate of £25 per class. The respondent offered to backdate the higher weekend rate for the claimant to December 2017 when she put the grievance in, but this did not resolve the claimant's complaint about the weekday rate, and she did not accept the offer.

48. 1 May 2018 was also the date of the claimant's grievance meeting. The grievance outcome letter was sent to the claimant on 9 May 2018 by Mr Silva. The grievance was not upheld. The outcome letter said that Mr Valentine's higher pay rate was because he was paid a weekend rate to secure his services due to market forces and a shortage of instructors willing to work weekends at the time of his appointment. The letter said this was not a practice the respondent (which did not own the business at the time) would undertake.

49. Stage 1 of the grievance was conducted by Mr Silva, but he relied very heavily on Mrs Dunn, the respondent's People Director. Mrs Dunn prepared the grievance outcome letter for Mr Silva and he signed it.

50. On 15 May 2018 the claimant appealed the grievance decision. A grievance appeal meeting took place on 7 June 2018 with Mr Stockford. Mr Stockford was the general manager. He was also new to the business having joined in March 2018. Mr Stockford listened to the claimant's appeal and correctly understood and recorded her complaint. He said he would follow up for her.

51. Like Mr Silva, Mr Stockford relied very heavily on Mrs Dunn in the appeal process. Mrs Dunn prepared the appeal outcome letter for Mr Stockford to sign. The appeal was not upheld, and the reason given were that the instructor rates of pay set by Witney Lakes Resort prior to the acquisition of the business by the respondent had been negotiated at the time of appointment. It said that any anomalies in pay were due to material factors, for example, difficulty in recruiting instructors in the local area, higher rates for holistic instructors and a shortage of instructors prepared to work at

weekends. The letter continued "…although some of these factors may no longer be the case we relied on this information during the due diligence process prior to acquisition."

52. After the appeal decision the claimant wanted to get more information so that she could consider whether to pursue her claim in the tribunal. She asked Mr Stockford if she could speak to former and past colleagues about her grievance. He said he denied her request referring her to the confidentiality term in her contract.

53. The claimant wrote back to Mr Stockford, saying that the clause only restricted disclosure to people outside the organisation, and asking if she could discuss confidential information with current staff. Mr Stockford said that the respondent did not want her to discuss the contents of her grievance with other employees.

54. Later, in July 2018, the claimant raised the same question with Mrs Dunn. Mrs Dunn also said that the claimant could not speak to colleagues about her grievance. Mrs Dunn said:

> "In the light of events last year that resulted in you being issued with a disciplinary warning, a reasonable management request has been made for you not to discuss details of your grievance which is a private matter between you and the company."

55. The reference here to a disciplinary warning was to a warning which had been issued to the claimant at the time the respondent took over the business in 2017 and which was by this point a spent warning. It related to discussions between the claimant and club members.

56. The respondent agreed to provide the claimant with pay information and produced an anonymised table of instructors and pay rates. It showed that the claimant and all female instructors who taught the same type of classes as the claimant were paid £20 per class. Some other female instructors had higher pay rates but that was for holistic classes such as yoga and Pilates and it was accepted that those classes were not comparable. Mr Valentine and Mr Price, another male instructor who had been employed by the respondent since 1999, were both paid £25 for teaching the same classes as the claimant, both in the week and at weekends. For the period for which information was provided, Mr Price did not work at weekends.

57. In her statement Mrs Hill said that Mr Price's rate of pay was increased from £20 per class to £25 per class when he moved to Oxford and was commuting further as she did not want to lose him from the business. There was no documentary evidence to support this or to show when the rate of pay changed or what the reasons for the change were. Mrs Hill also said that Mr Price worked on Saturday mornings, but the respondent's pay chart, which we accept is correct, showed that from 2012 he was not working weekends and was being paid £25 from that date.

58. The claimant notified Acas for early conciliation on 27 June 2018 and the certificate was issued on 10 July 2018. She presented her employment tribunal claim on 23 September 2018.

59. On 9 October 2018 the claimant was certified sick. That was her last working day at Witney Lakes Resort, she has been on sick leave since then. The GP diagnosed the claimant's situation as stress. Although she was unfit to work for the respondent, the claimant remained fit to work in other jobs and continued to do so.

60. The claimant said that as a result of being told that she could not discuss her grievance she was unable to explain to people why she was not doing her classes at the club and this led to rumours in her absence. She became aware of two members who thought that she had a serious illness or marital problems. We can see how a lack of information about the reasons for the claimant's absence could have led to speculation about that by members but there was no evidence before us that any rumours were started or amplified by the respondent's staff or that they were in fact aware of any rumours.

61. As to contact while the claimant was on sick leave, some group communications were sent to her, for example, emails from Mr Silva on 28 December 2018 and 24 May 2019. There were other communications that she was not included in, for example, emails of 13 and 18 February 2020 asking about class cover, an email about a proposed weekend event and emails about arrangements for the return to work in July 2020, after the first national lockdown.

62. On 5 February 2019 the claimant attended a welfare meeting with Mr Silva and Mr Stockford. There is a dispute between the parties about whether the claimant asked for minutes of this meeting to be taken. The respondent said she did not and that as it was an informal meeting no minutes were taken. We find that if the claimant did ask for minutes, none were sent and she did not chase this up until much later.

63. A preliminary hearing was held at the employment tribunal on 1 August 2019 at which there was a discussion to identify the claims the claimant was bringing and a discussion about the respondent's request for the claimant not to discuss her grievance with her colleagues. Following this hearing the claimant applied to amend her claim to include complaints of direct sex discrimination and victimisation. That application was refused on 29 November 2019.

64. In the meantime, the claimant had had an Occupational Health assessment on 13 August 2019. The medical report recorded the claimant's account in which she said she had,

> "Requested permission to discuss tribunal matters with members and other members of staff. She was advised that it would not be appropriate for her to do so and has not returned to work since.

> The claimant then began a long period of sickness due to finding it too stressful to come to the resort and not be able to discuss with staff and members. [She] is still teaching at other leisure facilities in the area and is actually competing in sporting events locally."

65. On 29 October 2019 the claimant had a medical capacity meeting with Mrs Ferma at which she said she was concerned about bullying treatment towards her and that she would not be able to return to work until it had stopped. Mrs Ferma said in her letter of 2 December 2019, sent to the claimant after this meeting, that she had not felt that the meeting was the right place to investigate these allegations as it was a health and medical capability meeting, but she invited the claimant to outline her complaint in writing so that it could be treated in line with the formal grievance process. Mrs Ferma asked the claimant to do this within the next 14 days. The claimant replied to say she was on leave for the rest of 2019 and would consider the correspondence on her return.

66. On 9 December 2019 Mrs Ferma replied asking the claimant for a response by 6 January 2020. When the claimant asked why the deadline was in place, Mrs Ferma replied on 10 December to say that she needed a date by which the claimant would have responded and that the original date had been extended to 35 days. The claimant replied to say that she would respond when she was ready and would no longer put up with bullying and intimidation. Mrs Ferma did not reply to that message.

67. The claimant notified Acas for early conciliation again on 13 December 2019 and a second certificate was issued on 18 December 2019. On the same day the claimant presented her second employment tribunal complaint complaining of direct sex discrimination and victimisation.

68. As part of the discussion between the claimant and Mrs Ferma, the welfare meeting of 5 February 2019 came up. The claimant said that at that meeting she had raised concerns about the way she was treated after putting in a grievance.

69. On 10 January 2020 the claimant asked Mrs Ferma for minutes of the meeting she had attended with Mr Stockford and Mr Silva on 5 February 2019. They were sent to her in a letter dated 20 January 2020. The minutes had been typed up much later from handwritten notes taken by Mr Stockford in his personal notebook. They did not mention the concerns the claimant had raised. The claimant did not think the notes were accurate. She raised this with Mrs Ferma who, in a letter dated 28 January 2020, invited the claimant to add amendments so that she was happy with the version on record. The claimant did not reply.

70. We do not find that the meeting notes were fictitious as the claimant alleged. We find that they were not a full or verbatim record of the meeting. They included the points which Mr Stockford (and Mr Silva, with whom he discussed the notes) thought were important. We find that the claimant did raise concerns at this meeting about the way that she was being treated by the club after making her grievance, but Mr Stockford and Mr Silva did not

recognise this as a serious complaint and Mr Stockford did not record it in his note of the meeting.

The law

Equal Pay

71. The equal pay provisions contained in the Equality Act 2010 prohibit gender discrimination in pay and contractual terms, ensuring the principle of equal pay for equal work between men and women. Section 65 defines equal work as follows:

> *"(1) For the purposes of this Chapter, A's work is equal to that of B if it is—*
>
> *(a) like B's work,*
> *(b) rated as equivalent to B's work, or*
> *(c) of equal value to B's work.*
>
> *(2) A's work is like B's work if—*
>
> *(a) A's work and B's work are the same or broadly similar, and*
> *(b) such differences as there are between their work are not of practical importance in relation to the terms of their work."*

72. The mechanism by which equal pay is achieved is a sex equality clause which is implied in every contract of employment by section 66 of the Equality Act. Where A and B are engaged on equal work with different terms, a sex equality clause has the following effect, pursuant to sub-section 66(2):

> *"(a) if a term of A's [work] is less favourable to A than a corresponding term of B's [work] is to B, A's term is modified so as not to be less favourable;*
>
> *(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."*

73. Therefore, if A can show that they are engaged on equal work with B, and a term of B's work is more favourable than A's, the sex equality clause operates to modify A's terms so that they are not less favourable than B's. However, section 69 provides that the sex equality clause has no effect if the employer can show:

> *"that the difference is because of a material factor reliance on which—*
>
> *(a) does not involve treating A less favourably because of A's sex than the [employer] treats B."*

Direct sex discrimination

74. Section 13 of the Equality Act 2010 prohibits direct discrimination. It provides:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

75. Protected characteristics are set out in section 4 of the Equality Act 2010 and include sex.

76. Establishing 'less favourable treatment' for the purposes of section 13 requires a comparison with someone who is more favourably treated than the claimant where there is no material difference between their circumstances and the claimant's circumstances (section 23). The person who is more favourably treated is known as the comparator. They can be a real person or a hypothetical person.

Victimisation

77. Another type of discrimination which is prohibited under the Equality Act is victimisation. Under section 27:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because*
>
> *B does a protected act…"*

78. A protected act is defined in section 27(2) and includes:

> *"(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

79. In the case of Chief Constable of West Yorkshire v Khan [2001] IRLR 830, the House of Lords considered the question of what amounts to a detriment, concluding that there are both subjective and objective elements. The claimant's view must be considered, but there must be 'a quality in the treatment that enables the claimant reasonably to complain about it'.

80. In the same case, the House of Lords considered the proper test for causation, in other words the proper test to be applied to decide whether a detriment is 'because of' a protected act. It rejected a 'but for' approach, concluding that the proper test is not a strict causation test. Rather the tribunal has to identify 'the real reason … the motive', for the treatment complained of.

81. In A v Chief Constable West Midlands Police EAT 0313/14, the EAT considered a victimisation complaint where the alleged detriment was a failure to hear a complaint fully. The EAT considered how a failure to hear a complaint fully could have been caused by the making of the complaint in

the first place, concluding that this was difficult to contemplate. The EAT suggested that if the particular nature of the complaint meant that it would not be discussed or dealt with in the same way that other complaints would, it could conceivably come within the scope of victimisation.

Time limit for complaints of direct discrimination and victimisation under the Equality Act

82. The time limit for bringing complaints of direct discrimination and victimisation under the Equality Act is set out in section 123. A complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. Conduct extending over a period is treated as done at the end of the period. Section 140B includes provisions extending time to take account of periods of Acas Early Conciliation.

Burden of proof

83. Sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) This does not apply if A shows that A did not contravene the provision."

84. In a case of direct discrimination, this means that if there are facts from which the tribunal could properly and fairly conclude that less favourable treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

85. In Igen v Wong [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. The court's guidance is not a substitute for the statutory language and that the statute must be the starting point.

86. In direct discrimination cases, the bare facts of a difference in status and a difference in treatment between a claimant and a comparator only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)

87. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever because of the protected characteristic. The respondent would normally be required to

produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

88. The burden of proof applies to other forms of discrimination, including victimisation. In a complaint of victimisation, it is for the claimant to establish that she has done a protected act and has then suffered a detriment, and that there is evidence from which the tribunal could conclude that there was a causal link between the protected act and the detriment, including that the employer was aware of the claimant's protected act. If those elements are established, the burden of proof shifts to the employer.

Conclusions

89. We reach our conclusions by applying the relevant legal principles to the findings of fact we have made, to decide the issues for decision by us as set out above.

Equal Pay

90. The purpose of the equal pay legislation is to eliminate gender pay differences, a form of gender discrimination. The law recognises that discrimination can be overt and also covert and that it can be conscious and sub-conscious. One of the ways it deals with this is to have a shifting burden of proof so that instead of the claimant being required to prove discrimination, in some circumstances the respondent is required to satisfy the tribunal of an absence of discrimination.

91. In the context of an equal pay claim, where a claimant can show that she is paid less than a male comparator who does equal work to her, the tribunal looks to the employer to explain the difference in pay. If the tribunal is satisfied that the difference in pay is because of a reason or an explanation which is not directly or indirectly sex discriminatory, then the claim does not succeed.

92. Equal work includes like work by virtue of section 65 of the Equality Act. In this case, it is accepted by the respondent that the claimant was engaged on like work with Mr Valentine and that he was paid £5 more per hour than she was, from the start of her employment in 2009. It is also accepted that the claimant was engaged on like work with Mr Price and he was paid £5 more per hour than she was, from some point prior to 2012. These accepted facts mean that the tribunal looks to the respondent to explain the difference in pay between the claimant and her male comparators. We consider the 'material factors' put forward by the employer.

93. We bear in mind some general points before we consider the specific reasons put forward by the respondent for the difference in pay in this case.

94. First, the way that a pay system is set up and the extent to which it is transparent or understandable are relevant factors for us to have in mind. As the burden is on the employer to explain the difference in pay, it is more

difficult for it to do so where its system lacks transparency. The more vague or opaque a pay system is, the more difficult it is to explain reasons for differences.

95. The relevance of this here is that the pay scheme which applied to the claimant and her comparators when their pay was set was not set out in any document or structured by reference to any clear criteria. We have accepted Mrs Hill's description of the pay scheme as 'rather ad hoc'. In the response to the claimant's grievance, the respondent implicitly accepted that its pay scheme before May 2018 was not transparent, as it introduced changes to ensure 'a more fair and transparent' pay structure.

96. Pay decisions were not recorded or documented at the time that they were made. The lack of contemporaneous documentation and the ad hoc nature of the pay scheme make it more difficult for the tribunal to be satisfied as we have to be that the pay differential is not related to gender in any way.

97. Secondly, the tribunal is likely to attach greater weight to an explanation which is given at an early stage and one which is consistent than to an explanation which is produced late in the day or which is inconsistent.

98. Here, from the time the claimant raised her complaint about pay, the explanations given by the respondent have not been consistent. The explanation has changed or has been expanded on at different stages in the process. Some reasons were only articulated or articulated in a particular way at the hearing itself.

99. Thirdly, the reasons put forward by the respondent must explain the pay difference throughout the whole period during which it subsists. The respondent accepted in its grievance appeal outcome that some of the reasons it relied on in that outcome no longer applied.

100. Finally, the respondent referred to the due diligence which was carried out in 2017 when the Club Company took over the business and said that it was satisfied that material factors justified the differences in pay at that time. We were not shown any evidence of that process but, in any event, the operation of the TUPE Regulations means that the respondent is liable for any breaches of the equal pay provisions even if the breaches arise from arrangements made before the respondents took over the business.

101. With those general points in mind we have considered the reasons that the respondent has given to explain the difference in pay between the claimant and her comparators. We have considered those reasons given in the grievance process, those given in response to the claim, and those given in the witness statements and the evidence we heard.

102. In the grievance outcome the respondent said that the reason for the difference in pay was market forces and shortage of instructors willing to work at weekends at the time of the appointment. Although this was asserted to be the case, we were not provided with any cogent evidence (or

any evidence) of a difficulty in finding instructors to work at weekends or of the operation of particular market forces.

103. The respondent concluded in the grievance that the weekend rate was the problem and that was the reason for the introduction of the weekend rate to provide a more fair and transparent pay structure.

104. We next considered the reasons put forward by the respondent in the response to the claimant's claim. In the response, the respondent said that Mr Valentine had been paid more because he worked at weekends. However, that cannot be the reason for the difference in pay, because the claimant covered for Mr Valentine's classes at weekends and when she did she was paid £20 per class. Likewise, when Mr Valentine covered for the claimant's weekday classes, he was paid £25 per class.

105. Another reason given in the ET3 response form was that Mr Valentine was Les Mills qualified. This reason was not pursued in detail at the hearing before us and we heard very little about it. It does not seem to us to explain the difference in pay for comparable classes in any event.

106. Three other reasons were given by the respondent in the ET3, the further information provided by the respondent and the grievance appeal outcome.

107. The first was a difficulty in recruiting instructors in the local area. We had very little evidence about recruitment. Mrs Hill said that she had a permanent advert for instructors on the website but often appointed instructors by recommendation. We saw no documentary evidence to support the suggestion that it was difficult to recruit instructors in the local area. We were told by the respondent where some instructors live but not all of them. We were not given any details about attempts to recruit locally or otherwise. We heard some evidence about travelling distances to work, and we come back to that.

108. The second reason given in the ET3, the further information and the grievance appeal was that holistic instructors were paid at a higher rate. However, it was agreed that holistic classes (for example yoga and Pilates classes) were not like work with the claimant's work. This is not an explanation for why Mr Valentine and Mr Price were paid more than the claimant to teach non-holistic classes which were like work with the claimant's work.

109. The last reason relied on in the ET3, further information and grievance appeal outcome was that there was a shortage of instructors willing to work at weekends. Again, we saw no evidence that recruiting weekend instructors was a problem. In any event, the higher rate of pay was not used as an incentive for working at weekends, since Mr Price was paid £25 for weekday work despite not working at weekends for the period in respect of which we were given pay data. The information provided by the respondent showed that female instructors who did classes comparable to Mr Price's were paid £20 per class.

110. The respondent also said in its further particulars that the weekend roles were advertised, and the claimant had chosen not to apply for them. We have found that this was not correct, and Mr Valentine was appointed on recommendation.

111. In her witness statement served prior to the hearing Mrs Hill introduced a number of other explanations for the difference between Mr Valentine's and the claimant's pay. These had not been mentioned in the grievance or earlier in the tribunal process. These were longevity of service, competence, class numbers and availability of instructor.

112. None of these reasons explain why Mr Valentine was paid more than the claimant. Longevity of service could not be an explanation as to why Mr Valentine was paid £25 per class from when he first joined. Competence and class numbers relate to features which could only be assessed when the instructor has done at least some classes, but, again, the higher rate of £25 per class applied to Mr Valentine from appointment. Mrs Hills' explanation that Mr Valentine's availability was a factor related to her evidence that there had been an increase in his pay at some stage after he joined which we have found (and the respondent accepted) did not happen.

113. We have considered whether the reasons given by Mrs Hill explain the difference in pay between the claimant and Mr Price. It was said that Mr Price received the higher rate because of longevity of service. However, there was no documentary evidence or record of Mr Price's class rate being increased or, if it was, the reasons why. The only explanation for why Mr Price was paid £25 was provided by Mrs Hill in her evidence. We have found that Mrs Hill's recollection of pay and employment arrangements was mistaken in relation to both the claimant and Mr Valentine. That is understandable given that she was recalling matters from some years ago and had not been involved in the business for some time. However, it means that we cannot attach much weight to her unsupported evidence about the pay history of Mr Price. In any event, the focus of the evidence we heard was on Mr Valentine; we have taken the same approach and focused on him as the main comparator.

114. We return to the reasons given for the difference in pay between the claimant and Mr Valentine. The claimant's witness, Mrs Jeffrey, was responsible for pay negotiations when Mr Valentine was hired. She also gave an explanation as to why he was paid more than the claimant. She explained that he travelled to work from Abingdon. He asked for a higher rate and she thought that was reasonable. This explanation is articulated differently to the reasons previously given by the respondent, although it relates perhaps to the suggested difficulty in recruiting in the local area.

115. We accept that this was the reason for Mr Valentine's higher rate of pay, as it is the reason given by the person who was responsible for negotiating that rate of pay. We are not satisfied that this reason is not related to Mr Valentine's gender for two reasons. First, Mrs Jeffrey said in her statement that she felt that Witney Lakes Resort would benefit from a male instructor and this is why she recommended him. She repeated this in her evidence

to us, saying 'We like a male instructor'. Secondly, Mrs Jeffrey explained that the reason the female instructor whose Saturday class was being covered by Mr Valentine one week in four was reducing her Saturday teaching was because, like Mr Valentine, she came from quite a distance. That instructor was paid £20 per class notwithstanding her longer journey. This suggests that something other than travel distance was the explanation for paying Mr Valentine more than the claimant and more than the female instructor whose classes he was taken on to cover.

116. More generally, in relation to travel distance and market forces as an explanation for pay differences, we were not given any details of where other instructors lived, how far they had to travel to work and what rates of pay they had asked for on joining.

117. Finally, Mrs Jeffrey's explanation for the difference in pay between Mr Valentine and the claimant only applied to the rate initially agreed for Mr Valentine by Mrs Jeffrey. She negotiated his initial rate of pay but was not responsible for and did not know his rate once he was permanently appointed to take on Saturday and Wednesday classes. Mrs Hill agreed his permanent rate. We found that none of the reasons Mrs Hill gave us satisfactorily explained the difference in pay between Mr Valentine and the claimant, given that he was paid £25 from when he first joined.

118. In summary, the claimant and all the female instructors doing comparable classes were paid £20 per class and Mr Valentine was paid £25 per class. The pay structure was ad hoc and not transparent. The explanations provided by the respondent for the pay difference were not consistent. The factual background on which some of the respondent's explanations were based, such as the link between the higher rate and weekend and weekday working, and the suggestion that weekend posts were advertised, have been found to be incorrect. We are not satisfied that the explanation provided by Mrs Jeffrey is not related to sex, given her explicit reference to sex and give the fact that Mr Valentine was appointed to cover classes for a female instructor who also had to travel from a distance. We are not therefore satisfied that the respondent has shown that the difference in pay between Mr Valentine and the claimant is because of a material factor which does not involve treating the claimant less favourably than Mr Valentine because of her sex.

119. The claimant's equal pay claim therefore succeeds. We return below to the question of remedy.

<u>Direct sex discrimination</u>

120. We next considered the complaint of direct sex discrimination. Mrs Pridsam made two complaints of less favourable treatment because of sex:

    120.1 the respondent failed to properly fairly consider her grievance about the difference in pay; and
    120.2 the respondent conducted a sham grievance into the claimant's grievance about equal pay.

121. We have to consider whether the claimant was treated less favorably than a hypothetical male comparator would have been treated and, if she was, whether that less favourable treatment was because of sex.

122. There is a shifting burden of proof here. If the claimant can show evidence from which we could conclude that there was discrimination, the burden of proof shifts to the respondent to satisfy us that the treatment was in no sense whatsoever because of sex.

123. The first issue for us is whether the claim is made out factually, that is whether the respondent did fail to properly and fairly consider the grievance and whether the grievance was a sham.

124. We have not found that the grievance procedure was a sham. The claimant was afforded a grievance meeting and an appeal meeting. At the appeal meeting Mr Stockford was careful to understand what the claimant was complaining about and the respondent took steps, prompted by the grievance, to try to address part of the claimant's complaint by introducing a weekend rate of pay, with a view to making the pay structure fairer.

125. The first stage of the grievance procedure in the claimant's case took longer than the respondent's procedure suggested but, overall, the process was broadly in line with the respondent's procedure and with Acas guidance, other than in one respect.

126. The conduct of the grievance is open to criticism in the extent to which, both at first stage and appeal stage, those appointed to make the decisions relied on HR. Neither Mr Silva nor Mr Stockford dealt with their involvement in the grievance process at all in their witness statements. In their evidence they could not explain their reasons for reaching the decisions they had, other than to say that they had signed outcome letters prepared for them by Mrs Dunn. Mr Silva said the process had been passed to HR to deal with. We accept that the equal pay framework is complex and specialist advice is likely to be required. Also, both Mr Silva and Mr Stockford had only recently joined the respondent and could be expected to need guidance. However, the approach taken went beyond that. The level of involvement of HR had the effect that the claimant's complaint was not determined by two different decisions makers at the first and second stages.

127. We have considered whether there is evidence from which we could conclude that this treatment was direct sex discrimination, that is that a man pursing an internal grievance would have been subject to more favourable treatment. If there is, we look to the respondent to explain the treatment and to satisfy us that this treatment is in no sense whatsoever related to sex.

128. We find that there is no evidence that would shift the burden to the respondent. The claimant said that if she had been male her grievance would have been taken seriously and dealt with straight away. She relied on the witness statement of a male employee who said that everything he asked of management was dealt with, but we had no details of what sort of

issues he raised with managers. He did not attend the tribunal and could not be questioned about this. We could not assess whehter he was an appropriate comparator in this respect.

129. There was no other evidence from which we could conclude that the claimant was treated less favourably than a male instructor would have been. In the circumstances, there is no evidence from which we could find that the conduct of the claimant's grievance was direct sex discrimination. That is not the same as saying that there were no criticisms which could be made of the process, but we apply the relevant legal tests to consider whether there was evidence from which we could conclude that the conduct was direct sex discrimination. We have decided that there is not, and therefore that we cannot make a finding of direct sex discrimination.

130. If we had found that there was discrimination in respect of the grievance process, the claimant's claim would on the face of it have been out of time. The appeal outcome was dated 15 June 2018. The claimant first raised a possible complaint about the grievance process at a preliminary hearing on 1 August 2019 and submitted her second claim on 18 December 2019. That was over 18 months after the grievance process had finished.

131. In the meantime, the claimant had submitted her first ET1 in September 2018. That meant that she had completed her first claim form around three months after the grievance procedure concluded, but chose not to mention that process in her first claim form. Had we reached this point we would have concluded that it would not have been just and equitable to extend time in respect of this allegation and this complaint would also have failed on grounds of time.

Victimisation

132. The claimant also made allegations of victimisation. In summary, victimisation is detrimental treatment because of a protected act. The respondent accepted that the grievance of 27 March 2018 was a protected act.

133. The claimant identified four detriments at the preliminary hearing. At the start of the hearing before us we clarified the four detriments on which the claimant relies (as set out in the issues section above).

134. The first detriment was that the claimant was ignored by staff and management. She provided further information on this point, saying that reception staff ignoring her and Mr Silva avoided her during the period 27 March to 9 October 2018. We have not found that this took place. We have not found that there was a change in attitude of reception staff or Mr Silva. There was insufficient evidence for us to make a finding that this was likely to have happened. This complaint therefore fails because of the factual basis of the complaint not being established.

135. Although the claimant was omitted from some emails which were sent to instructors, these were sent after the date her second claim was presented

and they are therefore outside the scope of the evidence we are looking at. In any event, we would have found that the reason the claimant was not copied in was because the emails were about work and class cover, and at the time they were sent the claimant was unfit to work.

136. The second detriment relied on by the claimant is that rumours were spread about fictitious problems between staff and members and that two members asked her about her health and marriage problems. We have found that those comments from the members took place. However, these were actions by members of the club, not by the respondent's employees or workers. There was no evidence that any rumours were started or amplified by the respondent's staff or even that they were aware of rumours. This complaint fails because there was no evidence of any discriminatory conduct for which the respondent would be liable.

137. We have dealt with issue 34d next (pressurising the claimant with deadlines). The claimant identified this complaint as referring to Mrs Ferma's emails of 9 and 10 December 2019, in which Mrs Ferma asked the claimant to provide her written grievance, first within 14 days and then by 6 January 2020. These documents were added to the bundle at the start of the hearing.

138. We have found that this took place in that the emails were sent, but we do not find the requests to amount to detriments. In Chief Constable of West Yorkshire Police v Khan, the House of Lords said that for something to amount to a detriment there must be 'a quality in the treatment that enables the claimant reasonably to complain about it'.

139. Here, the claimant had raised serious concerns with Mrs Ferma and Mrs Ferma wanted to investigate those concerns via the appropriate channels. The request that the claimant provide details of her concerns by a certain date was not a disadvantage to the claimant or unfair pressure on her. Overall, she had 35 days to reply, and she did not ask for any longer. If she had provided a written response, her complaints would have been looked in to. Although the claimant was upset by the setting of a deadline it was not objectively reasonable to regard this as a detriment. It was in the claimant's interests, rather than being a disadvantage, to ask her to provide details without delay.

140. If we had found this treatment to have amounted to a detriment, we would not have found that it was because of the claimant having made a grievance about equal pay on 27 March 2018. Mrs Ferma made her request in order to ensure that the appropriate procedure was followed, and the complaints investigated without delay. We conclude that she would have set those deadlines whether or not the claimant had made an equal pay grievance.

141. Finally, on victimisation, we have considered the claimant's allegation that she was threatened with disciplinary action and dismissal, as set out at issue 34c. This refers to correspondence between the claimant, Mr Stockford and Mrs Dunn during the period 15 June 2018 to 13 July 2018, when the claimant was told not to speak to past or present staff about their

work. In the correspondence Mrs Dunn reminded the claimant of her previous disciplinary warning. This has been the most complex of the claimant's complaints of victimisation for us to consider and we have given it very careful thought.

142. As far as the facts are concerned, we have found that the claimant was told not to discuss her grievance about pay with current or previous staff. We note that (although it does not take things much further or apply here) that there is a provision in section 77 of the Equality Act 2010, the purpose of which is to address pay secrecy and make it less difficult for people to discuss their pay. Here, the claimant was not told she could not discuss pay, only that she could not discuss her grievance, but in her circumstances it would have been difficult for her to have discussed pay without discussing her grievance. The respondent's approach meant that the claimant was wrongly restricted from speaking to colleagues to gather evidence to investigate and support her equal pay claim, when she was entitled to speak to potential witnesses. The respondent's approach also made the claimant feel isolated because she was unable to speak openly to colleagues and members about her situation. It was clearly a detriment for her.

143. We have to consider whether this detriment, the refusal to allow the claimant to discuss her grievance with colleagues, was because of the fact that the claimant had done a protected act. In other words, we have to consider whether the refusal to allow her to discuss her grievance was because she had made a grievance.

144. Victimisation complaints where the detriment is conduct related to the complaint itself are conceptually difficult because there is a tendency for things to become circular. Here, the refusal to allow the claimant to discuss her complaint was obviously because of the complaint in the sense that if she had not made a complaint there would not have been anything for her to ask the respondent for permission to discuss with colleagues. Put another way, but for the complaint, there would have been no refusal. However, in the case of Khan, the House of Lords rejected this approach, this 'but for' approach to victimisation. The proper test is not a strict causation test. Rather the tribunal has to identify 'the real reason, the motive', for the treatment complained of. In A v Chief Constable West Midlands Police the EAT highlighted the difficulties inherent in a claim that a failure to hear a complaint fully was caused by the making of the complaint in the first place, concluding that if the particular nature of the complaint meant that it would not be discussed or dealt with in the same way that other complaints would, it could conceivably come within the scope of victimisation.

145. Applying these principles in Mrs Pridsam's case, the reason (in the sense used in Khan) for the refusal to allow the claimant to speak to her colleagues was the respondent's desire to keep the grievance and the investigation private. This is what the respondent said, and this is why Mrs Dunn referred to the previous disciplinary warning which also involved confidentiality.

146. Considering the approach suggested in A v West Midlands Police, if there was evidence to show that the particular nature of the claimant's complaint had led to this restriction being put in place, this might suggest that the real reason for the conduct was the nature of the complaint being made and the fact that it was a complaint of equal pay. Although there is no requirement for a comparator in victimisation cases, evidence that other employees were permitted to discuss their grievances without restriction might have been relevant. There was no such evidence. There was no evidence to suggest that the respondent would have behaved any differently towards the claimant if she had been making any other type of complaint.

147. We have therefore concluded that the refusal to allow the claimant to discuss her grievance was not because of her grievance in the sense required by section 27 and therefore this complaint cannot succeed. That means that all of the allegations of victimisation fail and are dismissed.

148. Prior to reaching our final conclusion in respect of the discrimination and victimisation complaints, we stepped back and considered matters as a whole. As we have identified, there are aspects of the way the claimant was treated which could be criticised or which could have been done differently or better. But applying the relevant legal tests, we have not concluded that the treatment was because of the claimant's gender or because of a protected act.

Remedy

149. The first remedy in an equal pay claim is a declaration as to the claimant's rights. By the operation of the equality clause, the term in the claimant's contract relating to pay is modified to provide for her rate of pay for all classes, both weekday and weekend, to be the same as the pay term in the contract of her comparator, Mr Valentine, and that is a rate of pay £25 per class for both weekday and weekend classes[1].

150. Secondly, the claimant is entitled to arrears of pay running from the start of the six-year period prior to the presentation of her claim and to the date of the hearing. The six year period is the period from 24 September 2012 to 23 September 2018 (the presentation of the claim) up to 9 October 2018, which was her last working day before taking sick leave.

151. The claimant calculated the shortfall in pay in her schedule of loss (page 207) including all sessions in 2012, 97 in total. The claimant is only entitled to arrears of pay from 24 September 2012, not for the whole of 2012. The number of sessions worked by the claimant in the last week of September 2012 and the remaining months of 2012 was 44 (those details were set out on pages 204 and 205). Therefore, the calculations of the pay shortfall for the period from 24 September 2012 to 9 October 2018 are as set out in the

[1] The respondent's representative has written to the tribunal on 12 May 2021 to ask for clarification of what pay structure will apply to the claimant on her return to work. The tribunal's declaration as set out in this paragraph explains the modification of the claimant's contract which occurred by the operation of the equality clause. The pay structure which will apply to the claimant on her return to work was not an issue before the tribunal.

first table of the claimant's schedule of loss, other than for 2012 which should read 44 sessions and not 98. The pay shortfall for 2012 was therefore £220, the same as 2018 when the claimant also did 44 sessions. Making that adjustment to the figures in the first table of the claimant's schedule of loss gives a total pay shortfall of £3,080.

152. The award should also include holiday pay shortfall. Again, the figures are as set out on the claimant's schedule except for 2012 where the holiday pay shortfall is the same as 2018, so £26.55. The total holiday pay shortfall is therefore £371.74.

153. The pay and holiday pay shortfalls combined are £3,451.74.

154. The interest on an award of equal pay applies from the mid-point between the start date of the pay period of the arrears and the date of calculation of the award, the date of the hearing on 19 April 2021. In Mrs Pridsam's case the number of days between 24 September 2012 and 19 April 2021 is 3,129 days. The mid-point is 1,564 days.

155. The claimant is entitled to interest at eight per cent for that period. The daily rate of interest is calculated as 0.08 ÷ 365 days x £3,451.74 (the sum awarded). The daily rate is then multiplied by 1564 (the number of days for which interest is awarded). The interest calculation comes to £1,183.24.

156. The total award of pay and holiday pay shortfall plus interest is therefore £4,634.98.

157. The tribunal can make an award of damages arising from the breach of the implied equality clause in the claimant's contract. The claimant claimed damages in respect of loss of earnings from the period when she was on sick leave to date. We have to consider whether the losses during sick leave arose from the breach of the implied equality clause in the employment contract. We had little medical evidence on this. We were shown some of the GP sick notes which recorded situational anxiety. We have also seen the Occupational Health report which we included in our findings of fact above. That recorded the claimant's explanation as to why she was unable to come to work. She said that it was because she was told it would not be appropriate to discuss tribunal matters with members and other members of staff and she was finding it too stressful to come to work.

158. We have not found that the restriction on the claimant discussing the case itself amounted to unlawful discrimination and although it is connected with the breach of the equality clause, this suggests that it was the restriction on discussing the case rather than the breach of contract which was the reason for her sickness absence.

159. If we had found that the claimant was entitled to damages for loss of earnings arising from the breach of the equality clause, she would have been under a duty to mitigate her losses. She was able to work elsewhere while on sick leave from the respondent and continued to do so. We would

have concluded that she could have mitigated the losses arising from her absence with the respondent by taking on classes or other work elsewhere.

160. For those reasons we have concluded that the claimant is not entitled to damages for losses arising from her sickness absence. We have no power to make an award for injury to feelings in equal pay complaints.

161. Finally, we have to consider whether there should be an increase of the award pursuant to section 207 of the Trade Union and Labour Relations Act 1992. That provision applies where there is an unreasonable failure to comply with an Acas Code of Practice.

162. We have first considered whether there was a failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures. We have concluded that there was. Mr Silva's outcome letter and Mr Stockford's outcome letter were not decisions reached by them. Mr Stockford did not know how the outcome of the appeal had been reached. This meant that the claimant was denied her right of appeal provided for in paragraph 27 of the Code of Practice, which requires that the appeal be dealt with impartially.

163. We have to consider whether the breach of the Code was unreasonable. We conclude that it was. The respondent should have advised the grievance and appeal decision makers of the need for them to reach their own decisions.

164. We consider that it would be just and equitable in the circumstances to increase the award by 10 per cent. That level reflects the nature of the breach but also reflects the fact that this was not a case in which there was a wholesale failure to comply with the Code. Some steps were taken.

165. In summary, the award to the claimant of arrears of pay and interest is £4,634.98, comprising £3451.74 gross arrears of pay and £1,183.24 interest. After the 10% uplift for the failure to comply with the Acas Code of Practice, the total award to the claimant is £5,098.48.

Equal Pay Audit

166. After giving our judgment on remedy we heard submissions from both parties on the mandatory equal pay audit provisions in the Equality Act 2010 (Equal Pay Audits) Regulations 2014. Regulation 2 provides that where a tribunal finds that there has been a breach of the equal pay provisions in the Equality Act 2010, the tribunal must order the respondent to carry out an equal pay audit, subject to exceptions in regulation 3.

167. Regulation 3 sets out circumstances in which an audit must not be ordered. These are where a tribunal considers that:

> *"(a) the information which would be required to be included in the audit under regulation 6 were the tribunal to make an order, is already available from an audit which has been completed by the respondent in the previous 3 years;*

(b) it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing;
(c) the breach which the tribunal has found gives no reason to think that there may be other breaches; or
(d) the disadvantages of an audit would outweigh its benefits."

168. Regulation 5 requires that an order for an audit must specify the description of persons in relation to whom relevant gender pay information must be included in the audit.

169. We could not identify any relevant case law on these regulations.

170. We have considered this issue carefully. The respondent's pay structure has been amended since May 2018 and the pay scheme is now transparent and not gender-based. We consider this to be important, and bearing that in mind, we do not think this is a case in which an audit must be ordered, for the following reasons.

171. We concluded that the case falls within paragraph (b) of Regulation 3(1). The change in the respondent's pay structure means that it is clear without an audit that no action is required to avoid pay breaches occurring in the future in respect of the instructors.

172. We considered the claimant's comments about the pay of employees other than instructors. The wording of Regulation 5 requires us to specify who we should order information to be provided for, and we decided that it would be difficult for us to do that without any evidential basis. All we have looked at in terms of evidence in this hearing, understandably, is information about the pay of instructors. Given that the instructors' position has been corrected going forward, it did not seem to us that there was any scope for specifying other persons in respect of whom we had not heard any evidence. Therefore paragraph 3(1)(c) applies, as there was no evidence before us to suggest that there might be other breaches.

173. We find that paragraph 3(1)(d) applies as well. Given the changes that were made in May 2018, it would be disproportionate to require steps to be taken to confirm what we already know, which is that changes were made and that the position is that a non-gender based scheme is now in place for the instructors.

174. So, for those reasons, we have concluded that we must not make an order for an equal pay audit. Paragraphs 3(1)(b), (c) and (d) of the regulations apply here, and those are circumstances in which we should not make an order.

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Employment Judge Hawksworth

Date: 25 June 2021

Sent to the parties on: ...1July 2021....
THY
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For the Tribunal Office